GOOD PROPERTY LAND DEVELOPMENT PTE. LTD.

v.

SOCIETE GENERALE

HIGH COURT, SINGAPORE
CHAN SEK KEONG J
[SUIT NO. 39 OF 1989]
4 FEBRUARY 1989

CIVIL PROCEDURE: *Injunction to restrain sale of mortgaged property - Duty of mortgagee in exercising power of sale - To obtain the true market value reasonably obtainable at the time of sale - Not required to wait for best market conditions - Mortgaged property sold at undervalue - No fraud - Mortgagee did not act in bad faith - Mortgagor could not provide security - Amount owed substantial - Injunction not allowed.*

This was an application by the plaintiff for an injunction to restrain the sale of a hotel by the defendant. The said hotel had been mortgaged by the plaintiff under a loan agreement. The defendant put the plaintiff into receivership. The defendant sold the said hotel together with a management contract for the sum of $180.2 million. A buyer who had offered $186 million without the management contract was rejected. The defendant had negotiated with other buyers. The debt outstanding was considerable.

Held:

[1] The duty of a mortgagee was to obtain the true market value which could reasonably be obtained at the time of sale. He was not required to wait for the best market conditions.

[2] Although the sale of the mortgaged property was at an undervalue, the contract of sale could not be set aside as there was no fraud and the mortgagee did not act in bad faith.

[3] Since the mortgaged property was an investment property, damages would be an adequate remedy for the plaintiff if they succeeded at the trial.

[4] On the balance of convenience, the application for an injunction to restrain the sale of the mortgaged property was not allowed. The defendant and other creditors would lose further and more interest would accrue. Since the amount owed was outstanding the plaintiff could not provide adequate security by depositing a sufficient sum to give adequate protection to the mortgages.

[Application dismissed with costs.]

Cases referred to:

American Cyanamid Ltd. v. Ethicon [1975] AC 336
Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd. [1971] Ch 949
Tse Kwong Lam v. Wong Chit Seng [1983] 3 All ER 54
Ng Mui Mui v. Indian Overseas Bank Ltd. [1986] 1 MLJ 203
Forsyth v. Blundell [1973] 129 CLR 447
Holohan v. Friends Provident And Century Life Office [1966] IR 1
Waring v. London and Manchester Assurance Co. Ltd. [1935] Ch 310
Bishop v. Bonham [1988] 1 WLR 242
Pianta v. National Finance of Trustees Ltd. [1964] 38 ALJR 234
Harvey Roach (Petroleum) Pty. Ltd. v. Credit House (Vic) Pty. Ltd. [1976] VR 309
Parry v. Grace [1981] 2 NZLR 273

Other sources referred to:
The Law of Mortgage Fisher & Lightwood 10th Edn. pg 392
Injunctions and Specific Performance Sharpe [1983] para 617

JUDGMENT

Chan Sek Keong J:

This application by the plaintiffs, as mortgagors, for an interlocutory injunction to restrain the completion of the sale of the property known as the Hotel Meridien ("the mortgaged property") by the defendants to Hotel Properties Ltd. ("HPL") was a sequel to my judgment in Originating Summons No. 1151 of 1988 where I ordered the removal of a caveat lodged by the plaintiffs (who were the defendants in those proceedings) prohibiting the registration of any instrument affecting the mortgaged property without the prior consent of the plaintiffs. There, I found that the grounds upon which the caveat was filed were unsustainable in law but I reserved the issue of the availability of an interlocutory injunction to the considered in properly constituted proceedings.

The plaintiffs have now commenced this action and have, in this application, repeated their allegations that the defendants (in these proceedings) as equitable mortgagees of the mortgaged property have exercised their power of sale improperly and accordingly the Court should restrain the completion of the sale until the trial of the action. The indorsement on the writ herein also contains a prayer for the agreement of sale between the plaintiffs and HPL to be set aside although HPL have not been sued as co-defendants.

I have already set out in the grounds of decision relating to the previous proceedings a brief summary of the events leading up to the sale of the mortgaged property. Here, I will only outline the case for the plaintiffs, that the sale to HPL was improper and the defendant's case to the contrary. The application before was, of course, not the trial of the action but only an application for an interlocutory injunction to preserve the *status quo* by restraining the defendants from proceeding to complete sale of the property to HPL. Counsel for the parties have, presumably because of the nature of relief prayed for, approached and argued their respective cases as if this application were subject to the ordinary rules governing the grant of interim injunction as laid down by *American Cyanamid Ltd. v. Ethicon* [1975] AC 336.

The basic question in these proceedings is the extent of the duties of the mortgagee *vis-a-vis* the mortgagor in exercising his power of sale. It is unnecessary for me to trace the historical development of the law relating to the duties of a mortgagee. As far as this Court is concerned, the law is as stated in *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch. 949 where the Court of Appeal decided that a mortgagee had two duties: one to act in good faith and the other "to take reasonable precautions to obtain ... the true market value of the mortgaged property at the date on which he decides to sell it "(per Salmon LJ at p. 966). The decision in *Cuckmere's* case has received the approval of the Privy Council in an appeal from Hong Kong viz. *Tse Kwong Lam v. Wong Chit Seng* [1983] 3 All ER 54. *Cuckmere's* case has also been followed by our Court of Appeal in *Ng Mui Mui v. Indian Overseas Bank Ltd.* [1986] 1 MLJ 203.

These duties do not preclude the mortgagee from preferring his own interest to that of the mortgagor provided that he does not disregard the interests of the mortgagor. He is not a trustee of his power of sale *vis-a-vis* the mortgagor. Thus, the mortgagee is not required to wait for the most propitious market conditions to sell or to delay a sale in the hope of obtaining a better price. He is also not required to consult the mortgagor as to the time and

the manner of sale. He can sell by private treaty or public action provided that he takes adequate steps to publicise the sale and bring it to the notice of a reasonable number of prospective buyers.

In the present case, the relevant events as disclosed in the affidavits filed in these proceedings and in the previous proceedings were as follows:

(a) the plaintiffs were in default under the loan agreement since 1985 and have been unable to repay the loan and interest thereon;

(b) the defendants did not declare a default until 18 December 1987 at which time the amount owing was about US$60 million and about SwF$5 million plus about SwF $1.3 million for default interest; the plaintiffs have disputed these sums on the ground that they have a claim for damages of $32 million against the defendants for breach of duty in connection with the defendants' failure to carry out certain currency exchange transactions;

(c) the defendants put the plaintiffs into receivership in March 1988 and the receivers and managers have been in control of the plaintiffs' affairs since then;

(d) the defendants did not appear to have made a firm decision to sell the mortgaged property until about April or May 1988 when: (i) the receivers and managers obtained a valuation of the mortgaged property at $113,700,000 and (ii) the plaintiffs began collecting and collating information until September 1988 on the number of prospective buyers and the price indications from them;

(e) in September through to October 1988, the defendants began negotiations with various interested buyers: there was Party A who offered $184 million but were unable to put down the requisite deposit; there was party B who indicated a price of $70 million and asked for the contract documents: there was Party C who was indicated a price of $180 million but eventually offered $173.5 million; the other terms under negotiations in each case have not been disclosed to the Court;

(f) on 12 October 1988, the receivers and managers obtained another valuation of $147,600,000 for the mortgaged property;

(g) Forbin Ltd. (a company controlled by Ng Teng Fong) negotiated (through Richard Ellis Pte Ltd., international real estate agents) with the defendants on 11 November 1988 to buy the mortgaged property. On 12 November 1988, they were able to offer $180 million (which they have alleged was actually accepted by the defendants and which the defendants have denied): prior to these negotiations, Forbin had shown no interest and had merely indicated a price of $150 million without the Meridien Management Agreement, i.e. they would not undertake to retain Meridien Straits as the managers of the hotel. Their offer of $180 million was also to such effect. On 12 November 1988, Forbin was told that the mortgaged property had been sold to HPL, the sale having been concluded in Paris, whereupon Forbin in addition to maintaining that it had a concluded sale with the defendants increased its offer to (i) $181.2 million the same day, (ii) $183 million on 14 November 1988, and (iii) $186 million later on the same day.

(h) HPL negotiated with the defendants at the same time as Forbin; HPL's initial indication of a price was $140 million. Just before 4 November 1988 this figure was increased to $168 million with the Meridien Management Agreement. On 7 November 1988, HPL indicated that they wished to negotiate at around $173.5 million and this was increased to $180.2 million on 12 November 1988 when the sale was concluded. The defendants

have stated that HPL had made it a condition that the contract must be signed by 12 November 1988. They have also stated that Forbin also made it a condition that the offer of $180 million must be accepted on the same day of the offer;

(i) the plaintiffs were informed of the defendants' intention to sell the mortgaged property by a letter dated 3 October 1988 when the defendants said that they would sell it by tender on or about 10 October 1988. The plaintiffs were asked to submit names of interested bidders. On 10 October, the defendants informed the plaintiffs that they were negotiating with a party which had offered the highest price to date and that they were prepared to sell by private treaty. (This was presumably a reference to party A.) The plaintiffs were not informed of the said price. On 18 October 1988, the plaintiffs complained that they were given too short time to arrange for buyers. On 20 October 1988, the defendants warned the plaintiffs that they were proceeding to sell;

(j) on 4 November 1988, the defendants decided to sell the mortgaged property by closed tender subject to an undisclosed reserved price; the reason for this decision was that the sale to party A fell through. Tender documents were sent out to 43 selected real estate brokers, investment houses, hotel owners and operators, most of whom were in Singapore and some in Hong Kong. Although bids for the mortgaged property could be submitted from 4 November 1988 to 19 December 1988, the plaintiffs reserved to themselves the right to cancel the tender unconditionally at any time before 24 November 1988 even if there were prior bids in excess of the undisclosed reserved price (disclosed in these proceedings as $175 million). Subject to this right, the defendants were bound to accept any offer equal to or exceeding the reserved price. The defendants exercised the right of cancellation a few days after they had sold the property to HPL.

(k) according to a memorandum prepared by Richard Ellis after their clients had failed to secure the mortgaged property, the defendants informed them on 11 November 1988 that they were prepared to sell it for $175 million with the Meridien Management Contract and $180 million without it. According to the same memorandum, the defendants told Richard Ellis after the sale to HPL that the Meridien Group were very good customers of the defendants in Paris and that the defendants did not wish to sell the mortgaged property without the management contract being retained by the Meridien Group. The defendants have denied the accuracy of the contents of the memorandum.

The events summarised above are obviously susceptible to different interpretations and indeed the plaintiffs have sought to interpret them to mean the following:

(a) the defendants failed to ascertain the true market value of the mortgaged property before selling it to HPL at $180.2 million; no proper valuation was obtained from valuers with expertise in valuing a first class hotel like the Hotel Meridien;

(b) the defendants were prepared to sell it at the reserved price of $175 million which was just sufficient to cover their own exposure;

(c) the defendants insisted on selling the mortgaged property with the management contract in order to protect the interest of the Meridien Group; this preference diminished the number of prospective buyers as many like Forbin, were not interested in retaining the managers;

(d) HPL were given preference over Forbin as, *inter alia*, HPL were prepared to buy the mortgaged property with the management contract; as a result, the property was sold to HPL;

(e) the defendants acted too hastily in selling the mortgaged property to HPL; they failed to go back to Forbin in order to bid Forbin against HPL; they also failed to go back to previous offerors e.g. party A and party C; they also withdrew the closed tender (which contained more advantageous terms for the plaintiffs) on 14 November 1988 when they could safely have waited until 23 November 1988; in failing to act accordingly, the defendants have failed to realise $186 million or more (up to $200 million) for the mortgaged property;

(f) the defendants' omissions in (e) were calculated decisions to prefer HPL and to keep out other interested buyers; Forbin were never in the running for the mortgaged property and were being used as a cover to sell it to HPL;

(g) similarly the closed tender was a sham as (i) the terms thereof particularly the cancellation clause and the time frame for the submission of bids for such a substantial property ensured that there would be no bids; (ii) the prospective bidders, other than Forbin and HPL, were not told they could negotiate privately with the defendants; and (iii) the defendants' intention, as they had admitted, was to draw out the best offers from Forbin and HPL and not to procure additional bids from other parties;

(h) Richard Ellis were made aware that the reserved price was $175 million; it was reasonable to infer that HPL were similarly aware; also HPL were informed of Forbin's last offer or else how could they have offered $180.2 million without a valuation report (HPL's valuation report is dated 15 November 1988): moreover, the defendants concluded the deal with HPL in Paris on the day following Forbin's firm offer (and alleged acceptance by the defendants) of $180 million.

(i) the conduct of the defendants as a whole showed that they had failed to take reasonable precautions to obtain the best price reasonably obtainable at the time of sale and that this failure was not due to mere negligence but a reckless disregard of calculated indifference to the interests of the mortgagor whilst at the same time advancing the interests of HPL and the Meridien Group.

(j) in the circumstances of this case, HPL were also or ought to have been aware of the facts which constituted the defendants' breach of duty.

The defendants have, of course, given different and innocent interpretation of their conduct. The debt secured was very large and had remained unpaid for three years. The plaintiffs were unable to redeem the mortgaged property; it had to be sold. They had negotiated with many parties at various prices. Interest on both the debt to the syndicate of banks and on the debt to the Urban Redevelopment Authority (who had the first contractual charge on the property) was accruing per month. The income from the mortgaged property was no more than $350,000 per month. It could only be used as a hotel and the number of prospective buyers was limited. It was generally known that the mortgaged property was up for sale; the business press had reported on it from time to time. The defendants had notified many parties informally and also formally of the sale of the mortgaged property in closed tender. HPL's offer of $180.2 million for the mortgaged property with the management contract was the best offer at the time of sale. Under the sale agreement, HPL had also agreed to pay an additional sum of $600.000 for the existing stock of goods in the hotel (subject to adjustment at date of taking over) and to be responsible for refunding to tenants rent deposits totalling $821,133.75. Moreover, HPL by agreeing to continue the management agreement had indirectly increased the sale price. These three items have increased the sale price substantially. The defendants had to make a commercial judgment as to when to sell and at what price to sell:

when they made it, they did so in good faith; they were not indifferent to the interests of the plaintiffs: on the contrary they had sought to protect the plaintiffs' interest. No preference was given to HPL. Preference was given to the highest offeror. The sale to HPL was the true market price; it was not an undervalue as no higher price was offered except for one at $184 million which was abortive. Forbin's higher offers were made after the defendants had signed the agreement for sale with HPL. The plaintiffs had made no attempt to find buyers. They did not want the mortgaged property to be sold and were obstructive from the beginning. When the defendants finally decided to sell it, the plaintiffs did not object but were only concerned with realising the best available price. Even if the defendants had sold the mortgaged property at an undervalue, which they denied, they had acted not in bad faith but at the very highest, negligently for which the plaintiffs have their remedy in damages.

In short, the plaintiffs' allegation are that the defendants have sold the mortgaged property at an undervalue in bad faith, i.e. with calculated indifference to their interest, or otherwise in breach of their duty as mortgagees.

In my view, the first and primary task of the Court is to determine whether the price at which the mortgaged property was sold was the best price reasonably obtainable at the time of sale. It is only after the Court has determined that the price was not the best price that the Court will go on to decide whether this was due to the fraud, bad faith or breach of duty (which, of course, includes negligence) on the part of the mortgagee. If the defendants are able to establish at the trial of the action that they have sold the mortgaged property at the proper price at the time of sale, these allegations must necessarily fall to the ground. The only exception to this principle is a sale to the mortgagee himself. In that situation, the Court will set aside the sale, irrespective of the price, on the ground that it is not a sale at all. This approach is, in view, supported by the decision of the Privy Council in *Tse Kwong Lum's* case. There, the mortgagee had put the mortgaged property up for action at a reserved price fixed without consultation with the auctioneers or any real estate agents. The only bid at the reserved price came from the mortgagee's wife. The mortgaged property was knocked down to her. The mortgagee then advanced the sum of $1.2 million to the company to pay off the mortgagee.

Lord Templeman, after reviewing the existing authorities, said (at p. 60):

> In the result their Lordships consider that in the present case the company was not debarred from purchasing the mortgaged property but, in view of the close relationship between the company and the mortgagee and in view in particular of the conflict of duty and interest to which the mortgagee was subject, the sale to the company for $1.2 m can only be supported if the mortgagee proves that he took reasonable precautions obtainable at the time of sale.

Their Lordships found, on the facts, that the mortgagee had failed to establish that, but because the mortgagor had been guilty of inexcusable delay in prosecuting his counterclaim, he was not entitled to have the sale set aside but only to his remedy of damages.

What was the true market value of the mortgaged property that was reasonably obtainable in November 1988? The affidavits filed therein have disclosed that:

(a) the best price offered for it in September/October 1988 was $184 million;

(b) the best price offered and accepted at the time of sale was $180.2 million + $600,000 (subject to adjustment) + $821,133.75 + an undertaking to continue the management contract (thus nullifying any claim for against the plaintiffs for breach of contract;

(c) the best price offered by an unsuccessful bidder viz. Forbin after the sale was $186 million, on terms which could not be said to be more advantageous than those accepted by HPL;

(d) the best price obtained by the plaintiffs (after I have reserved judgment for a few days) was $185 million from a new party on terms which have yet to be agreed upon.

If the dispute between the parties were decided solely on the price actually available at the time of sale, and nothing more, it would be difficult for a Court to reach any conclusion other than that HPL's price was probably the best price reasonably obtainable at the time of sale. But, that is not the test. There is before me *prima facie* evidence that (a) the defendants have sold the mortgaged property to HPL without apparently having first obtained a reliable valuation of the mortgaged property; (b) there was a phenomenal rise in the value of the mortgaged property from a valuation of $114 million in May 1988 to an increased valuation of about $148 million in October 1988 and then to an offer of $184 million until it was sold for about $181 million on 12 November 1988 whereupon an offer of $186 million was made; and (c) the omission of the defendants to bid HPL against Forbin and the unnecessary and premature closing of the closed tender. On this evidence, it would be wrong for the Court to conclude that the plaintiffs have not *prima facie* established a reasonable cause of action.

I have already said that Counsel for both parties have argued this application on the basis that the *American Cyanamid* principles were applicable. On that basis, the plaintiffs did not have to show at this stage of the proceedings a *prima facie* case that the mortgaged property was sold at an undervalue but only that their allegations were not frivolous and vexatious. I found that they were not.

But if the defendants had sold the mortgaged property at an undervalue, the consequential issue would arise as to whether the breach of duty was made in bad faith or through recklessness or mere negligence or even error of judgment. The allegations of the plaintiffs, if proved, are capable of giving rise to a finding that the defendants have acted not merely negligently but in bad faith.

In this respect, the plaintiffs have relied strongly on the decision of the High Court of Australia in *Forsyth v. Blundell* [1973] 129 CLR 447, in support of their case. There, a mortgagee (ASL) had sold privately the mortgaged property to Forsyth (as nominee of Shell) for A$120,000 after another bidder (XL) had expressed its intention to bid at a proposed auction (which was never held) at a price of A$150,000 or higher. The High Court of Australia held, on the facts, that the mortgagee had acted with calculated indifference to the interests of the mortgagor and that therefore the power of sale was not exercised in good faith. The Court granted an injunction to restrain Forsyth from completing the sale. The judgment of Mason J (now CJ) on the question of the bad faith of the mortgagee, ASL, was as follows:

> It is essential to keep in mind that this is an unusual case. The property had a special value to a limited class of potential purchasers, the oil companies. What is more, neither the evidence, nor the findings of his Honour, reveal the true value of the property at the time when it was sold to Shell. Expert evidence as to value was not called, although evidence was given of valuations obtained by, or known to, ASL before the sale. Accordingly, the plaintiffs were unable to show that the sale was at an undervalue. Nor did they show that ASL failed to take usual steps to test the market or bring the property to the attention of potential buyers. The breach of duty alleged arose from ASL's selling privately to Shell, knowing as it did, that XL had expressed interest in buying the property at the forthcoming auction, instead of proceeding to auction at which Shell and XL could be expected to compete against each other, or informing XL of the Shell offer and giving it the opportunity of improving upon that offer.

(p. 507) In these circumstances there was clear evidence that XL was genuinely interested in the site and that there was a distinct possibility that it would pay in the vicinity of $150,000 for it.

ASL's failure to follow up XL's expressed interest in the property was in my view a serious departure from accepted standards in seeking to obtain the best price then available. Knowing that there were two interested potential purchasers, with no reason to think that either was not genuine, ASL should have brought them into competition so as to obtain the highest price which either would offer. Yet it made no attempt to bring Shell and XL into competition. For no justifiable reason ASL decided to disregard XL's announced interest as a potential buyer of the property. Its action in so doing in my view constituted a failure to take reasonable precautions to obtain a proper price. (pp. 508-509)

...

I am left with the overwhelming impression that ASL determined willy nilly on a sale to Shell for a price which would cover the moneys owing to it, notwithstanding that there was a real possibility of selling at a higher price to XL and despite its knowledge that XL would take over the mortgage and preserve the mortgagor's equity, if the need arose.

It seems that in contest for the site between XL and Shell, ASL preferred that Shell should become the purchaser. (p. 510)

...

In these circumstances I conclude that ASL in exercising its power of sale did not act *bona fide* in the sense that it was reckless, not caring whether the price obtained was a price obtained was the sale Shell should be characterized as "mere negligence... (p. 511)

I have quoted extensively from the judgment of Mason J because the facts of that case bear a striking resemblance to the facts of the instant case, save that (a) here, Forbin had not indicated that they were prepared to pay more than $180 million **before** the mortgaged property was sold to HPL, and (b) in that case there was a potential substantial undervalue of 20% whereas here, the undervalue (on the basis of Forbin's offer of $186 million) would be 3.75% or less if the other terms of the sale are taken into account.

Another decision strongly relied upon by the plaintiffs is that of the Supreme Court of Ireland in *Holohan v. Friends Provident And Century Life Office* [1966] IR 1 where the Court granted a permanent injunction restraining the completion of the sale of the mortgaged property on the ground of breach of duty on the part of the mortgagees. The facts were that the mortgagees' own surveyors had advised that the mortgaged property could be sold at up to 11,000 Pound with vacant possession as it had development potential. The mortgagees ignored the advice and sold the mortgaged property on an investment basis (i.e. subject to existing tenancies) at 5,500 Pound. The undervalue was potentially very substantial but the trial Judge found it was not such an undervalue as to be in itself evidence of fraud in *mala fides* or sacrifice of the property. On appeal, the Supreme Court reversed the decision and found that the mortgagees, in having deliberately refused to consider an alternative mode of sale which would have in all probably realised a substantially higher price for the mortgaged property, were in breach of their duty to the mortgagor. The precise nature of the breach of duty was not identified by the Supreme Court.

There is, in the present case, an issue of law on which the existing authorities do not give a ready answer. The issue is whether the Court will restrain the completion of a sale where the mortgagee has sold the mortgaged property in good faith but is otherwise in breach of duty in having sold at an undervalue. Fisher & Lightwood on the *Law of Mortgage* 10th Edn. states the law on this point as follows: (at p. 392):

> If the mortgagee has exercised his powers improperly, and the purchaser has knowledge of the facts, the purchaser cannot obtain a right superior to the right of the mortgagor. The mortgagee and the purchaser may then both be restrained from completing the sale, and the same applies even where, at the date of contract, the purchaser was unaware of the impropriety of the sale.
>
> If the mortgagee has, in exercise of his power of sale, entered into a contract for the sale of the property, the Court will not, upon tender of the money due under mortgage, interfere to stop the completion of the sale by conveyance unless the sale is improper.

The first paragraph of his passage derives its authority from *Forsyth v. Blundell* where Walsh J and Mason J upheld the decision of the trial Judge, Fox J (*Blundell v. Associated Securities Ltd*.) [1970] 19 FLR 17) that so long as the purchaser was aware of the mortgagee's impropriety at the time of the sale to him or became aware of such impropriety before completion, the sale, if uncompleted, would be restrained, and, if completed, would be set aside on terms of repayment. In *Forsyth v. Blundell*, the trial Judge found as a fact, (*ibid* pp. 39-40), that Shell had not acted fraudulently, even in the enlarged sense described in *Nocton v. Ashburton*, but held as a matter of law that 'it is notice before conveyance which matters and absence of notice before contract is in general irrelevant". *Holohan's* case is also to the same effect both as regards the finding of fact in the Court below and of the law by the Supreme Court.

The second paragraph of the same passage is derived from *Waring v. London and Manchester Assurance Co. Ltd.* [1935] Ch. 310, but in that case, Crossman J was referring to an improper sale in the context of an allegation of gross undervalue amounting to bad faith and not a mere breach of duty in failing to realise the true market value. What his Lordship said (at page 318) was as follows:

> Of course, if the purchaser becomes aware, during that period, of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then, in my judgment he gets no good title on taking the conveyance.

It is therefore arguable that where the breach of duty is not due to any fraud or bad faith or recklessness on the part of the mortgagee, the sale of the purchaser is good and the Court should not restrain completion or set aside the sale, as otherwise undue hardship could be caused to innocent purchasers. This very issue was raised in *Bishop v. Bonham* [1988] 1 WLR 242. In that case, the plaintiffs, as chargees, contracted to sell the defendant's 15,000 shares to the sister of the defendant at 1 pound per share. These shares had a peculiar value in that the company was a family company which had intended to reorganise its business and the control of those shares could decide the voting one way or the other. The defendant, alleging that for this reason the value was worth not less than 3.34 pound per share to his sister refused to execute a transfer of the shares to the plaintiffs. The plaintiffs sued for specific performance. The defendant counterclaimed for the sale to be set aside. The plaintiffs applied to have the counterclaim struck out on the ground, *inter alia*, that the Court could not set aside the contract of sale in the absence of fraud or bad faith even where it was proved: (1) the sale was at an undervalue; (2) the sale was in breach of the plaintiffs' duty to the defendant; and (3) that the purchaser was aware of the sale at an undervalue and made in breach of duty. It was also submitted that in the absence of bad faith, the defendants' remedy was in damages. The Deputy Judge, in holding that this was a difficult issue of law which could not be decided in interlocutory proceedings, made the following observations:

Once it has been accepted that a mortgagee has broken the obligations which it was held in the *Cuckmere* case are, in the absence of bargain to the contrary, imposed upon him, the question of what steps the Court will take to prevent breach of that duty or to compensate for the breach is a matter of remedy. There seems to me to be nothing in any authority which prevents the Courts from interfering by way of injunction to prevent the making of a contract of sale which would be in breach of duty. Equally once a contract has been made, it seems to me that it would be most remarkable if the Court was limited as to the means by which it could remedy the breach of the duty. Of course, the Courts will be very slow to set aside a contract of sale under which the purchaser is a wholly innocent party. It may be that they will never do so, though it is arguable that they might in the case of fraud by the mortgagee: see the Australian decision in *Forsyth v. Blundell* and in dicta of Crossman J in the *Waring* case: and see Oliver J's analysis in the *Knightley v. Sun Life Assurance Society* case at pp. 37d 42b.

However, where the sale is being made by the mortgagee in breach of his duty of care to the mortgagor and the purchaser is aware that the sale is being made in breach of that duty of care, the transaction is affected by bad faith in the extended sense in which that term is used in this context. In such a case there seems no reason why the Court should not interfere to set the contract aside. A contract of sale requires that there should be a buyer and a seller. The reason for not allowing a mortgagor to attack a sale by mortgagee except in the most exceptional circumstances is (1) that the innocent purchasers from mortgagees should be able to buy safely and (2) that any extensive right in a mortgagor to attack sales by mortgagee would make it extremely difficult for a mortgagee to sell advantageously. In the case in which it is shown that the purchaser is aware that the mortgagee is selling to him in breach of duty to the mortgagor, it seems to me at least strongly arguable that neither of the reasons for the rule apply and that there is no reason for a Court to hesitate in setting the contract aside.

It is true that cases such as *Waring* and *Property & Bloodstock* refer to the bad faith involved as if it were inevitably that of the mortgagee. This will, of course, usually be the case, but it seems to me that it is at least properly arguable that the requirement that the exercise of the power of sale should be affected by bad faith before the Court will set aside the sale can equally be satisfied where the purchaser is guilty of bad faith (in its extended sense) in that the purchaser is proceeding with the purchase in the knowledge that the mortgagee is making the sale in breach of duty to the mortgagor. It is at least strongly arguable that where a mortgagee contracts, in breach of his duty to the mortgagor, to sell the security and the purchaser knows of the facts that constitute the breach of duty, then the contract could be set aside by the Court.

It will, of course, be a very rare case where the purchaser is aware of the breach of duty. The duty, in the absence of special contract or statutory provision (as in the case of building society mortgages) may briefly be stated as a duty to taker reasonable care to obtain whatever is the true market value of the property at the time of sale. It is only in case such as the present where the mortgagor can allege both the pruchaser's knowledge of the undervalue, and the purchaser's knowledge of the allegedly inadequate steps taken to market the property, that a claim to set aside on this basis could be made.

The issue of law raised in *Bishop v. Bonham* is highly relevant to HPL although they are not a party in these proceedings. The allegation made against them is that they were aware of the defendants' breach of duty before or at the time they agreed to buy the mortgaged property. Whether or not they should intervene to be added as a party in order to protect their rights is a matter for them to decide.

It is not disputed that if damages were an adequate remedy to the plaintiffs, the defendants, being a large international commercial bank, would be able to meet any damages that resulting any breach of duty by them. However, it is settled principle that damages would not be an

adequate remedy to a party who has been or will be deprived of his enjoyment of or interest in land. The same principle is applicable to the converse case of a claim for specific performance of a contract of sale of land. Damages are inadequate because no two parcels of land can be identical and a piece of land may have a peculiar and special value in the eyes of the purchaser. Therefore, it might be said that damages would not be an adequate remedy for the plaintiffs here if the injunction were refused and if they were to ultimately succeed, only to find that the sale of the mortgaged property to HPL was no longer defeasible by virtue of s. 38 of Land Titles Act. This is an important point. I have, however, in my oral judgment, said that in this case damages would probably be an adequate remedy to the plaintiffs. It is necessary to explain what I meant.

Land may be owned for personal enjoyment (e.g. for dwelling or as gardens, etc.) or they may be owned as investment i.e. for profit. In circumstances where the main object of owning land is not the personal enjoyment thereof but the profit derivable therefrom, would be unrealistic to believe that damages would not be an adequate remedy to the owner for the loss of the mortgaged property. I am aware that there is high authority to the contrary: see in *Pianta v. National Finance of Trustees Ltd.* [1964] 38 ALJR 234 where Barwick CJ said (at p. 233):

> But in my opinion this proposition is without foundation in law, even if the respondent had had no other business than that of subdividing and selling land and had made a decision to subdivide and sell the subject land, but see the Canadian authorities referred to in *Sharpe on Injunctions and Specific Performance* 1983 para. 617.

In the present case, there is no doubt that the Hotel Meridien is an investment property. The plaintiffs are looking at it solely in terms of its value as an investment. They are not even in a position to hold on to the mortgaged property as an investment as they are unable to redeem it. Counsel for the plaintiffs in his submission was quite candid in admitting that the object of the plaintiffs in commencing this action is to set aside the sale in order to put the mortgaged property up again for sale with a view to realising a better price than payable by HPL. Although the plaintiffs believe that the mortgaged property was sold to HPL at an undervalue, there is, of course, no guarantee that, should the sale to HPL be set aside eventually, the best price reasonably obtainable then would be more than (a) the principal and interest of the secured debts owing at that time or (b) even the impugned sale price of $180.2 million ++. All that the plaintiffs could show and have shown is that there was Forbin's offer of $186 million made two days after they had lost their bid and a current offer plaintiffs were prepared to entertain. Counsel for the defendants had pointed out that if a sale of the mortgaged property were concluded in three months time at $185 million, it would be no more advantageous than completing the sale with HPL immediately, which HPL had undertaken to do. The plaintiffs' real concern was the bottom line. This was what I had in mind when I said that damages would probably be an adequate remedy.

On the evidence submitted by receivers and managers, the plaintiffs are insolvent. They have a negative net worth of more than $74 million (in claims from unsecured creditors) the greater portion of which are owing to the controlling shareholder directly or indirectly. If the defendants were ultimately successful in this action, they could not be adequately compensated unless the value of the mortgaged property has appreciated to a corresponding extent to set off the amount of interest that is accruing daily on the principal of the debt together with any other loss that may result from adverse foreign exchange movements. The total debt secured by the property is about $173 million made up of three different currencies (i.e. Singapore Dollars, United States Dollars and Swiss Francs). The interest is accruing at

the rate of $1.7 million per month whilst the net income from the property is currently approximately $350,00 per month. In two years time (and here I am giving a conservative estimate of the time required for the action to be heard at first instance,) the secured debt would have increased by about another $32.4 million (without taking into account any potential liability due to adverse movement in currency exchange rates). This is a staggering sum of money. No one can safely predict what the market value of the mortgaged property will be in two years' time, much less that it would appreciate to an extent which would cover the amount of secured debt then outstanding.

The inevitable conclusion I came to was that, if the interlocutory injunction were granted, the defendants and the syndicate of banks could stand to lose an additional $32.4 million or even more, and the unsecured creditors the estimated surplus of $5 million realisable from the sale of HPL, whereas the plaintiffs, whatever the outcome of this action might be, would stand to lose nothing because they have nothing to lose.

I therefore had no doubt that the balance of convenience was overwhelmingly in favour of not granting, except on terms, an interim injunction which would have the effect of preventing HPL from paying the remaining 90% of the purchase price to the defendants on Monday, 15 January 1989 [which, they are reported to have paid] in order to take possession of the mortgaged property and thus stopping the interest on the debts from accruing further.

The plaintiffs were unable to provide any substantial security forthwith. Their Counsel suggested, but without any degree of assurance, except for the amount of $1 million, that the principal shareholder of the plaintiffs might, if given time, be able to raise adequate security to secure the payment of future interest accruing pending the trial of the action. Counsel for the plaintiffs also suggested intervals as and when the need arose. I did not think it would be wise for the Court to embark on such a course which could do more harm than was foreseeable. It could not solve the problem of a recurrent liability which is increasing by about $1.35 million per month. If the plaintiffs were given, say an initial period of two months, to raise the security and they were to fail to do so at the expiry of that period, the debt would have been increased by another $2.7 million to the detriment of the unsecured creditors. It was further suggested by Counsel for the plaintiffs that the real loss would be borne primarily by the family of the principal shareholders of the plaintiffs who are also directly or indirectly the largest unsecured creditors of the plaintiffs. I did not consider this circumstances could be a sufficient reason to allow them to put the interest of the minority unsecured creditors at risk at a time when the plaintiffs are already insolvent. Accordingly, in the absence of any assurance that the plaintiffs could provide adequate security for the period up to the estimated date of trial of the action, I decided it would not be proper to grant an interim injunction.

There is one other aspect of the law which also has limiting effect on the power of the Court in granting the interlocutory injunction. Where the mortgagor is seeking to restrain the completion of a sale on the ground of bad faith or any other breach of duty, he must make payment into Court. The amount need not be the full amount required for redemption as that would be too harsh on the mortgagor (although in *Forsyth v. Blundell*, full payment was ordered and made by the mortgagor), but it should be an amount sufficient to give adequate protection to the mortgagee: see Sugerman J in *Harvey Roach (Petroleum) Pty. Ltd. v. Credit House (Vic) Pty Ltd.* [1976] VR 309.

Therefore, whether the principles established in *American Cyanamid* governing the issue of interlocutory injunctions in ordinary actions (the applicability of which to mortgage actions has been doubted: see Thorp J in *Parry v. Grace* [1981] 2 NZLR 273) or the law of mortgage is applied in this application, the plaintiffs must provide adequate security which they have been unable to do.

Finally, I must refer to a point not raised before me in acknowledgment of the potential adverse effect my refusal to grant an interlocutory injunction will have on the plaintiffs' case. The defendants have registered their mortgage provisionally and final registration of thereof mortgage is imminent on account of the removal of the plaintiffs' caveat in Originating Summons No. 1151 of 1988. This will be followed by a transfer of the property from the defendants to HPL. Upon the final registration of the transfer, the title of HPL will become indefeasible under s. 38 of the Land Titles Act, subject only to the grounds of defeasibility prescribed therein. The only ground available to the plaintiffs is that of fraud. Therefore, it would appear to be the case that if HPL are able to register their transfer before the trial of this action, the plaintiffs would not be able to set aside the sale unless they can prove fraud on the part of the defendants. Counsel for the plaintiffs have not any time in his submissions to the Court used the expression "fraud" to describe the conduct of the defendants but had referred merely to the defendants' bad faith or calculated indifference to the plaintiffs' interest. If these allegations, if proved, do not amount to fraud under s. 38, then the plaintiffs could be subject to a more onerous burden than otherwise in their efforts to challenge the validity of the sale to HPL. This may appear unfair to the plaintiffs but the unfairness has arisen only because the plaintiffs are unable to provide adequate security pending trial. Security is required because the plaintiffs may not necessarily succeed at the trial.

Whatever the outcome may be in relation to the claims of the plaintiffs in these proceedings, the plaintiffs will at least have the consolation of still being able to pursue the defendants for damages for breach of duty which, inexplicably, they have not claimed in their writ.

It was for the above reasons that I dismissed the plaintiffs' application with costs in the cause.

Also found at [1989] 1 CLJ 847